1954

A. C. McCall v. Thomas Kendrick et al : Brief of Appellant

Utah Supreme Court

David S. Kunz; Attorney for Plaintiff and Appellant;

Case No. 8173

IN THE

SUPREME COURT

OF THE STATE OF UTAH

A. C. MC CALL,

Plaintiff and Appellant,

vs.

THOMAS H. KENDRICK, and R. F. SCHOBER, and UNION PACIFIC RAILROAD COMPANY, and OGDEN UNION RAILWAY DEPOT COMPANY,

Defendants and Respondents.

APPELLANT'S BRIEF

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and Appellant

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Defendants and Respondents.

STATEMENT OF THE CASE

This is an appeal from a verdict of a jury in the District Court of Weber County, Utah, the Honorable Parley Norseth, Judge thereof, presiding. For the convenience of the court and counsel, the parties will be referred to as they were in the lower court wherein the appellant was the plaintiff and the appellee was the defendant. This appeal is on questions of law only, and therefore only

such parts of the transcript, and such excerpts as are relevant and pertinent to the law questions raised are made a part of this record.

Plaintiff's amended complaint (omitting headings and signatures), is as follows:

Plaintiff complains of the defendants and for cause of action alleges:

1. That at all times hereinafter set forth the defendant, Ogden Union Railway and Depot Company, and defendant, Union Pacific Railroad Company, were corporations duly organized and existing under and by virtue of the laws of the State of Utah and doing business in Weber County, Utah.

2. That at all times hereinafter set forth the defendant, Thomas H. Kendrick, was an employee and agent of the defendant, Union Pacific Railroad Company, regularly employed by said railroad Company and acting within the scope of his employment.

3. That at all times hereinafter set forth the defendant, R. F. Schober, was an agent and employee of the defendant, Ogden Union Railway and Depot Company, regularly employed by said railway and depot company and acting within the scope of his employment.

4. That on the morning of the 27th day of November 1952, the plaintiff was arrested and charged with a misdemeanor by the defendants, Thomas H. Kendrick and R. F. Schober, at the Club Tavern, Ogden, Utah; that at said time and place the aforesaid Thomas H. Kendrick and R. F.

Schober were acting in the course of their employment as aforesaid; that said arrest was wrongful and without warrant or judicial order, or other authority of law; and at said time plaintiff was acting in a quiet, peaceable and law-abiding manner, and he had not committed any breach of the peace nor committed any offense, either a misdemeanor or felony, in or out of the presence of the defendants, or any of them; that in the process of said arrest, plaintiff was assaulted at the Ogden Union Railway and Depot Company station, and again assaulted and dragged out of the Club Tavern in said Ogden City, Utah, by said defendants.

5. That the defendants, Thomas H. Kendrick and R. F. Schober, unlawfully and wrongfully, under their authority as agents and employees of the defendants, Union Pacific Railroad Company and Ogden Union Railway and Depot Company, respectively, took plaintiff and caused him to be detained and confined in the police station of said Ogden City, Weber County, Utah, and had the plaintiff booked as being drunk, and then and there by force and violence wrongfully and unlawfully, without process or commitment of any kind whatever had the said plaintiff incarcerated in the tank of said Police Headquarters in Ogden City which said tank is part of the jail at said Ogden City.

6. That on or about the 28th day of November, 1952, at Ogden, Weber County, Utah the defendants, and each of them, contriving, maliciously and intending to injure the plaintiff; falsely, maliciously and without probable cause procured and caused certain criminal processes to be issued against the plaintiff charging the plaintiff with the commission of a criminal offense, to wit: the offense of drunkeness; that said complaint bears the file number of 27613 in the office of the Clerk of the City Court of Ogden City, Weber County, Utah.

7. That thereafter, on the 28th day of November, 1952 plaintiff was arraigned upon said complaint and entered a plea of "not guilty", that on the 16th day of December, 1952, said case against plaintiff came on for trial for the supposed crime so charged by the defendants, and each of them, before the Honorable J. Quill Nebeker, Judge of the City Court of Ogden City. That at the conclusion of said trial said Judge Nebeker found the plaintiff "Not guilty".

8. That by reason of the premises, plaintiff has suffered great pain and mental anguish and has been damaged in his good name and reputation all to his damage in the sum of $10,000.00.

9. That in doing the things herein alleged, the defendants, Thomas H. Kendrick and R. F. Schober, acted maliciously and were guilty of wanton disregard of the rights and feelings of the plaintiff, and by reason thereof, plaintiff demands exemplary and punitive damages against the said defendants in the sum of $10,000.00.

WHEREFORE, plaintiff demands judgment against said defendants, and each of them as follows:

1. For the sum of $10,000 as compensatory damages;

2. For the sum of $10,000 as exemplary and punitive damages;

3. For attorney's fees, costs of suit; and

4. For such other and further relief as to the court may deem proper.

To this complaint, the defendants Thomas H. Kendrick and R. F. Schober, filed their answer to

to amended complaint as follows, (omitting headings and signatures):

Come now the defendants, Thomas H. Kendrick and R. F. Schober and by way of answer to the amended complaint of the plaintiff on file herein admit, deny and allege as follows:

1. Answering paragraphs 1 to 5, inclusive, of said amended complaint these defendants incorporate by this reference their answers to paragraphs 1 to 5 of plaintiff's original complaint on file in this action and make the same answers to said paragraphs 1 to 5 of plaintiff's amended complaint as was heretofore made by these defendants to paragraphs 1 to 5 of plaintiff's original complaint.

2. Answering paragraph 6 of said amended complaint these defendants admit that on or about the 28th day of November, 1952, the plaintiff was charged in the City Court of Ogden City, State of Utah, with the commission of a criminal offense, to-wit: the offense of drunkenness; and further admit that said complaint was signed by T. H. Kendrick. Defendants deny the remaining allegations of said paragraph 6.

3. Answering paragraph 7 of said amended complaint the defendants deny that the plaintiff appeared in court and was arraigned on the 28th day of November, 1952, and allege the fact to be that said plea of "not guilty" was entered for the plaintiff by a Judge of the City Court of Ogden City in the absence of said plaintiff. These defendants further admit that said criminal case came on for trial on the 16th day of December, 1952, before a Judge of the City Court of Ogden City and that the plaintiff was found not guilty at said trial. Defendants deny each and every other allegation in said paragraph 7 set forth not hereinbefore in this paragraph of this answer specifically admitted.

4. Answering paragraph 8 of said amended complaint these defendants deny the same.

5. Answering paragraph 9 of said amended complaint these defendants admit that the plaintiff demands exemplary and punitive damages from these defendants. Said defendants deny the remaining allegations of said paragraph 9.

6. Further answering said amended complaint these defendants deny each and every allegation thereof not hereinbefore in this answer specifically admitted.

7. Further answering said amended complaint and as a separate defense thereto said defendants allege that the plaintiff was arrested by them pursuant to their responsibilities as peace officers of the State of Utah, and that said arrest was in all respects lawful and proper pursuant to the statutes and laws of the State of Utah; and further allege that the filing of the complaint charging this plaintiff with a misdemeanor by T. H. Kendrick was in all respects lawful and proper pursuant to the statutes and laws of the State of Utah, and these defendants further allege that their conduct in all particulars was in good faith and based upon their honest conclusions from fact observed by them.

WHEREFORE, said defendants pray that they be given judgment in their favor, and that the plaintiff take nothing by reason of his complaint, and that in addition thereto these defendants and each of them be awarded reasonable attorney's fees and costs pursuant to the provisions of the statutes of the State of Utah.

The defendants Union Pacific Railroad Company and the Ogden Union Railway and Depot Company filed their answer to the amended complaint

as follows, (omitting headings and signatures):

Come now the defendants, Union Pacific Railroad Company and The Ogden Union Railway and Depot Company and by way of answer to the amended complaint of the plaintiff on file herein admit, deny and allege as follows:

1. Answering paragraphs 1 to 5, inclusive, of said amended complaint these defendants incorporate by this reference their answer to paragraphs 1 to 5 of plaintiff's original complaint on file in this action and make the same answers to said paragraphs 1 to 5 of plaintiff's amended complaint as was heretofore made by these defendants to paragraphs 1 to 5 of plaintiff's original complaint.

2. Answering paragraph 6 of said amended complaint these defendants admit that on or about the 28th day of November, 1952, the plaintiff was charged in the City Court of Ogden City, State of Utah, with the commission of a criminal offense, to-wit: the offense of drunkenness; and further admit that said complaint was signed by T. H. Kendrick. Defendants deny the remaining allegations of said paragraph 6.

3. Answering paragraph 7 of said amended complaint the defendants deny that the plaintiff appeared in court and was arraigned on the 28th day of November, 1952, and allege the fact to be that said plea of "not guilty" was entered for the plaintiff by a Judge of the City Court of Ogden City in the absence of said plaintiff. These defendants further admit that said criminal case came on for trial on the 16th day of December, 1952, before a Judge of the City Court of Ogden City and that the plaintiff was found not guilty at said trial. Defendants deny each and every other allegation in said paragraph 7 set forth not hereinbefore in this paragraph of this answer specifically admitted.

4. Answering paragraph 8 of said amended complaint these defendants deny the same.

5. Answering paragraph 9 of said amended complaint these defendants allege that said paragraph 9 of plaintiff's amended complaint is immaterial as to these defendants. Further answering said paragraph 9 these defendants admit that the plaintiff demands exemplary and punitive damages from the defendants Thomas H. Kendrick and R. F. Schober. These defendants deny the remaining allegations of said paragraph 9.

6. Further answering said amended complaint these defendants deny each and every allegation thereof not hereinbefore in this answer specifically admitted.

7. Further answering said complaint and as a further and separate defense these defendants allege that the arrest of the plaintiff by the defendants, Thomas H. Kendrick and R. F. Schober, and the charging of the plaintiff with a misdemeanor in the City Court of Ogden City by the defendant T. H. Kendrick was all done pursuant to the authority of said individuals as peace officers of the State of Utah; that the same was done in good faith; and that said arrest and said complaint were in all respects lawful and proper under the statutes and laws of the State of Utah.

WHEREFORE, said defendants pray that they be given judgment in their favor and against the plaintiff "no cause of action", for their costs of suit herein, and for such other and further relief as to the court shall seem just and equitable in the premises.

On the basis of the foregoing pleadings trial was had and the case submitted to the jury on the basis of the evidence adduced thereat, and upon the court's instructions. Plaintiff objects to

and raises upon this appeal the correctness of instructions numbers 4, 5, 8, 9, 10, 12, 15, and 17. Said instructions are set out more particularly as follows:

No. 4.

Gentlemen of the jury, you are instructed that the burden of proof is upon the plaintiff to prove by a preponderance of the evidence, or the greater weight of the evidence, each and every allegation made by him in his complaint before you can find a verdict in his favor.

And if you find and determine from the evidence introduced in this case that the plaintiff has failed to establish the burden of proving the allegations of his complaint by the greater weight of the evidence, then it is your duty to bring in a verdict in this case against the plaintiff and in favor of the defendants, no cause of action.

But if you find from the evidence introduced in this case that the plaintiff has proven each of the allegations of his complaint by the greater weight of the evidence, then it is your duty to bring in a verdict in his favor, against the defendants.

No. 5

You are instructed that the defendant Kendrick was not, on the 27th day of November, 1952, a special deputy sheriff of Weber County, Utah,

and was not by law authorized to perform the duties of a special deputy sheriff in said county, but you are further instructed that on the 27th day of November, 1952, the aforesaid Kendrick was a special agent of the Union Pacific Railroad Company and he was, by virtue of the laws of the State of Utah and ordinances of Ogden City hereinafter referred to, authorized to make lawful arrests in the Union Depot at Ogden, Utah. And if you find from the preponderance of evidence that the arrest of McCall was made without authority of law, and that the subsequent prosecution of McCall in the City Court was made maliciously and with intent to injure McCall without probable cause, then the said plaintiff McCall is entitled to recover from the defendants such damages as you may assess against the said defendants, not to exceed the sum of $10,000.00 compensatory damages and exemplary and punitive damages.

You are further instructed that if you find from the preponderance of the evidence in this case that the plaintiff McCall was drunk when arrested, and if you find further from the evidence that the subsequent prosecution of McCall in the City Court of Ogden City, Weber County, Utah, was not made maliciously and was not made with the intent to injure McCall and with probable cause, then your verdict should be in favor of the defendants and against the plaintiff, no cause of action.

No. 8

You are instructed that the statutes of this State in effect on

November 27, 1952, provided as follows:

> "32-7-13. Drinking and drunkenness in public places.-- No person shall drink liquor in a public building, park or stadium or be in an intoxicated condition in a public place."

> "32-8-10. Drunkenness in public place.-- Everyone who violates any of the provisions of section 32-7-13 shall be liable for a first offense to a penalty of not less than $10 nor more than $50 and in default of immediate payment, to imprisonment for not more than thirty days; for a second offense to a penalty of not less than $25 nor more than $100 and in default of immediate payment to imprisonment for not less than one month nor more than two months. For a third or subsequent offense, to imprisonment for not less than one month nor more than six months without the option of a fine."

You are also instructed that the statutes of this State provided as follows:

> "32-8-25. Duties of officers respecting infringements of this act.--All inspectors appointed under this act, and all sheriffs, deputy sheriffs, mayors, city judges, justices of the peace, constables, marshalls and peace officers, and all district,

county, city and town attorneys, and clerks of courts shall diligently enforce the provisions of this act.***"

Under these statutes it was not only the right of the defendants Schober and Kendrick but their positive duty under the law of this State to arrest the plaintiff if, in fact, he was in an intoxicated condition at the depot in Ogden on November 27, 1952.

No. 9

You are instructed that the statutes of the State of Utah in effect at the time of the plaintiff's arrest provided, in so far as material here, are as follows:

"77-13-3. A peace officer may, without a warrant, arrest a person for a public offense committed or attempted in his presence."

Said statutes in effect at the time of the plaintiff's arrest also provided, in so far as is material here, that:

"77-13-4. A private person may arrest another for a public offense committed or attempted in his presence."

You are further instructed that one of the ordinances of Ogden City in effect on November 27, 1952, provided as follows:

"Drinking liquor in public places and drunkenness. Any person who shall drink any intoxicating

liquor in any street or alley, public place, store, restaurant, hotel lobby or parlor, in or upon any passenger coach, street car or other vehicle commonly used for the transportation of passengers, or in or about any depot platform, waiting room or station room or in any public gathering of any kind, or who shall be drunk or intoxicated within the corporate limits of said City, shall be deemed guilty of a misdemeanor."

Under the foregoing statutes and the foregoing ordinance, Mr. Kendrick and Mr. Schober had a legal right to arrest the plaintiff if he violated said ordinance while in the presence of said officers. Therefore, if you believe that the plaintiff did violate said ordinance in the presence of Mr. Kendrick and Mr. Schober on November 27, 1952, then I instruct you that his arrest by these men was not unlawful and the prosecution therefore was not wrongful or improper, and your verdict must be in favor of the defendants, no cause for action.

No. 10

You are instructed that a person is drunk or intoxicated within the meaning of the Ogden City ordinance I have quoted to you when he is under the influence of intoxicating liquor to such an extent that he is not entirely himself. It is not necessary that a person be "dead drunk" or "hopelessly drunk" in order that he be considered drunk or intoxicated within the meaning of the

ordinance. If a person has consumed enough intoxicating liquor that his mental or physical capacities or his judgment or his normal control of his actions have been materially impaired, then such person is drunk or intoxicated within the meaning of those words as they are used in that ordinance.

No. 12

You are instructed that if you find Mr. Kendrick had reasonable and probable cause for believing that the plaintiff was intoxicated in violation of said ordinance of Ogden City, and further, that Mr. Kendrick did honestly and fairly believe that the plaintiff was intoxicated in violation of said ordinance at the time when Mr. Kendrick signed the complaint charging the plaintiff with said violation, then there was no malicious prosecution of the plaintiff; and you should not award the plaintiff any damages against any defendant for such prosecution, even though you now believe, in light of all the circumstances shown by the evidence, that the plaintiff was not actually drunk or intoxicated on November 27, 1952, at the depot in Ogden, in violation of said Ogden City ordinance.

No. 15

You are instructed that if you find from a preponderance of the evidence that Mr. Kendrick made a full, fair and truthful disclosure of the facts which he knew, or which he might have learned by reasonable diligence, in any way connected with the events of November 27, 1952, to the Assistant City Attorney, Mr.

Sneddon; and further, that Mr. Sneddon advised Mr. Kendrick that he had probable cause to initiate the prosecution of the plaintiff for the offense of violating the Ogden City ordinance quoted in these instructions; and that Mr. Sneddon thereafter prepared the complaint which Mr. Kendrick signed; and that Mr. Kendrick in good faith did believe that there was probable cause to initiate that prosecution, then that is a complete defense to the portion of this action in which the plaintiff alleges a malicious prosecution of him by the defendants; and in such event, you are instructed that you should award the plaintiff no damages against the defendants for said alleged malicious prosecution.

No. 17

You are instructed that the plaintiff, in addition to actual damages, asks that he be awarded punitive damages in the sum of $10,000.00. You are instructed that punitive damages, also known as exemplary damages, mean damages given by way of punishment for the commission of a wrong. Punitive damages are only allowed where a wrong is committed under circumstances evidencing an evil motive, actual malice, deliberate violence, or vindictiveness. You are instructed that you may allow punitive damages where a wrong is committed under such circumstances as the court has just described, but you should not do so unless you find from a preponderance of the evidence that Mr. Kendrick or Mr. Schober acted with evil motive, actual malice, deliberate violence,

> or vindictiveness. Punitive or exemplary damages are not the measure of the actual damages sustained, but are damages given by way of punishment to make an example, for the public good, and to deter others from offending in a similar manner. Such damages are not given as a matter of right, but as punishment. Punitive damages are to be awarded with caution. Such damages should not be disproportionate to the actual damages sustained, if any, and should bear some relation to the damages complained of and the cause thereof.
>
> If you find for the plaintiff and assess punitive or exemplary damages in addition to actual damages, you must, in the form of the verdict, set up the actual and punitive damages separately.

On the basis of the instructions given and the evidence, the jury returned a verdict no cause of action, whereupon the plaintiff filed a motion for new trial, basing his arguments primarily upon the refusal of the court to grant his proposed instructions 3, 7, 8, and 14, on the court's rulings as set forth in paragraph 1 of plaintiff's motion for a new trial.

The motion for a new trial was denied and thereafter the court awarded attorney's fees to the defendants pursuant to the provisions of

Title 78-11-10 UCA 53.

Thereafter, and within the time allowed by law, plaintiff served and filed his notice of appeal to this court and filed his statutory undertaking upon appeal to this court.

ASSIGNMENT OF ERRORS

1. That the court erred in giving instruction number 4 relative to the burden of proof.

2. That the court erred in refusing to give plaintiff's proposed instruction number 7.

3. That the court erred in refusing to give plaintiff's proposed instruction number 8 and in awarding defendant Schober attorney's fees.

4. That the court erred in giving its instruction number 5.

5. That the court erred in giving its instruction number 8.

6. That the court erred in giving its instruction number 9.

7. That the court erred in giving its instruction number 17 and in refusing to grant plaintiff's proposed instruction number 21.

8. That the court erred in giving its instruction number 10.

9. That the court erred in giving its instruction number 15.

ARGUMENT

I

THAT THE COURT ERRED IN GIVING INSTRUCTION NUMBER 4 RELATIVE TO THE BURDEN OF PROOF

This instruction advises the jury that the burden of proof is upon the plaintiff to prove by a preponderance of the evidence each and every allegation made by him in his complaint before the jury can find a verdict in his favor. The jury is here advised that if the plaintiff fails to prove all the allegations of his complaint by the greater weight of the evidence, that it is then their duty to bring in a verdict against the plaintiff and in favor of the defendant.

The instructions as to the burden of proof are of primary importance in aiding the jury to interpret the facts of the case to the law of the case. Errors and ambiguities in defining the burden of

proof and in interpreting it to the jury can result in substantial prejudice to the rights of a litigant.

The general rule is that the burden of proof is on the party who has the affirmative of an issue as determined by the pleadings and a party pleading a fact has the burden of proof as to that fact or issue.

The law on this subject further provides that the plaintiff has the burden of proof as to the elements of his cause of action, and the defendant has the burden of establishing special or affirmative defenses.

31 CJS Evidence Section 104.

This rule of law regarding the burden of proof has been further defined as follows: "The burden is upon the plaintiff to allege and establish the facts upon which he relies for recovery." Eagle Picher Mining and Smelting Co. vs Layton, 77 P(2) 1137.

Applying the accepted rules of law to the instant case we find that the plaintiff alleged

the following facts to constitute his complaint:

1. False arrest and false imprisonment by the defendants.
2. Malicious prosecution by the defendant Kendrick.
3. That plaintiff was entitled to punitive damages for such malicious prosecution, false arrest and imprisonment.

There is no interdependence of these charges, the charge of false arrest and false imprisonment is a charge which stands alone and is not directly related to, nor dependent upon, the establishment of the charge of malicious prosecution and punitive damages.

The error of this Instruction No. 4 is most clearly apparent when it is realized that not only did the court fail to advise the jury of the fact that the false arrest charge could stand by itself, but that the court went further and advised the jury of the exactly opposite proposition. The court in Instruction No. 4 stated that the burden of proof was upon the plaintiff to prove by a preponderance of the evidence each and every allegation made by him in his complaint before the jury could find a verdict in his favor.

The prejudice of this instruction to the plaintiff's case can easily be seen if one would assume from the evidence that the jury may have found that plaintiff had been falsely arrested and falsely imprisoned, but further found that the element of malice on the part of the defendants was not proved and that for that reason the case of malicious prosecution and subsequent punitive damages was not proved. Applying Instruction No. 4 to such finding of facts by the jury, it could only have resulted in the entire verdict going against the plaintiff and in favor of defendant even though the jury may have found that the allegations of false arrest and false imprisonment had been proved to their satisfaction.

In such a fact situation, a situation which is not at all improbable under the pleadings and proof of the instant case, the unfair burden of proof required by Instruction No. 4 could only have had the effect of causing plaintiff to fail in his entire cause even though the jury were

satisfied that he should prevail in his claim for false arrest and imprisonment.

An examination of the rules concerning the burden of proof in criminal cases is very helpful in an analysis of the errors complained of by plaintiff in Instruction No. 4. The general rule regarding the burden of proof in a criminal proceeding is as follows:

> "The burden in a criminal case, whether for a misdemeanor or felony, is on the prosecution to establish the guilt of the accused beyond a reasonable doubt, that is to prove every essential element of the crime charged, every fact and circumstance essential to the guilt of the accused, as though the whole issue rested on it." 22 CJS Criminal Law, Sec. 566.

It can be readily seen that the state has the burden of proving every essential element of the crime and every fact and circumstance essential to the guilt of the accused and that the failure to prove any one element or any fact and circumstance essential to the guilt will result in a failure of the entire case of the state.

The court, in giving Instruction No. 4, im-

posed an even greater burden upon the plaintiff in this case than is imposed upon the state in a criminal case. The requirement that the plaintiff must prove each and every allegation of his complaint misled the jury in that it did not make any distinction between allegations that were: (1) essential to making out a cause of action, (2) allegations that were not essential to making out a cause of action, (3) allegations that were admitted by the defendant's answer, (4) allegations that concerned the cause of action for false arrest and imprisonment, and (5) allegations that concerned only the issues of malicious prosecution and punitive damages.

The sweeping requirement of proving each and every allegation of the complaint, without the qualifying words of "material allegation", and without any explanation regarding the distinctions set out above could only have resulted in misleading the jury as to the proper burden of proof required of the plaintiff. Such an error certainly prejudiced the plaintiff's cause in the minds of the jury.

The case of the American Lumber and Export Company vs Love, 84 S 559, was an action against a sheriff on his official bond and the court gave the following instruction to the jury:

> "The court charges the jury that the burden is upon the plaintiff in this case to prove to a reasonable certainty every material allegation of its complaint, and, unless the jury find that the plaintiff has met such burden by a preponderance of the evidence, then the verdict must be for the defendant."

The court held that the foregoing charge was reversable error for the reason that it required too high a degree of proof by the plaintiff. It can be readily seen that the requirements for proof on the part of the plaintiff in the above case are substantially less than that required by the court in Instruction No. 4.

In the case of Eagle Picher Mining and Smelting Company vs Layton, 77 P(2) 1137,Oklahoma, the following instruction was given:

> "You are instructed that the burden of proof is upon the defendant to prove by a fair weight and preponderance of the evidence, all of the material allegations set forth in its answer as submitted to you in these instructions, except such matters as are admitted by the plaintiff to be true."

The court reversed a judgment in favor of the plaintiff for the reason that the foregoing instruction was error, in that it placed a greater burden upon the defendant than is placed upon him by the settled rule of law in such cases. The court in commenting on the instruction said:

> "It is a universal and unvarying rule of law that the burden is upon the plaintiff to allege and establish the facts upon which he relies for his recovery; to allege and establish such facts as will entitle him to recover. The underlying principle in which it is planted and from which it has had its growth constitutes one of the pillars of civil jurisprudence."

In all of the foregoing cases the instruc- contained merely the language to the effect that the burden was upon the plaintiff to establish the material allegations of his complaint, and yet in this case, Instruction No. 4 required the plaintiff, not to establish the material allegations of his complaint, but to establish each and every allegation of his complaint and stated further that if the plaintiff failed to establish

the burden of proving the allegations of his complaint by the greater weight of the evidence, that it was then the duty of the jury to bring in a verdict against the plaintiff and in favor of the defendants.

An early Utah case, Stevens vs Stephens, 47 P 76, is concerned with the question of the plaintiff's burden of proof. In that case the complaint alleged that the defendants were indebted to the plaintiff for goods sold. The answer denies all allegations of the complaint and then affirmatively alleges that when the goods were bought plaintiff and defendants were directors in four corporations and that defendants ordered the goods in question for the corporations, that the plaintiff knew they were being furnished for the corporation, and that no part of the goods were received by defendants, except as such agents or managers.

After stating the foregoing facts the court held as follows:

"...counsel for the plaintiff requested the court to rule that under the plead-

ings the burden of proof was on the defendants, but the court held that the burden of proof was on the plaintiff, and so instructed the jury. This action on the part of the court is set out as one of the causes of complaint. It is quite clear that both counsel and court were in error. As an abstract proposition of law, the statement of the court to the jury that 'the burden of proof is upon the plaintiff, and he must establish, by a preponderance of the evidence, the material allegations of his complaint,' is doubtless correct; but we are apprehensive that, under the pleadings, its application in this case, without stating the position which the defendants occupied respecting the onus probandi, was not only erroneous, but misleading to the jury as to the proper mode of determining the question at issue. The plaintiff was bound to make out a prima facie case, but he was not bound to prove, in the first instance, that the defendants were not acting as agents when they ordered the goods. The mere fact that agency was set up in the answer raised no presumption that such a relation actually existed. Agency was made the basis to defeat the plaintiff's claim, and therefore it was incumbent upon the defendants to establish it by affirmative proof. If, in a court of justice, one undertakes to make out a case against another, or, by affirmative defense, to release himself from the claim of another, the burden is on him to furnish the proof to make good his contention. Whart. Ev. ‖ ‖ 356, 357. In the case at bar the onus was on the plaintiff to prove his case substantially as alleged. Then, when this was done, it

was incumbent upon the defendants, in order to release themselves from the plaintiff's claim to show that the goods were ordered by them as managing agents for the corporations, and sold by the plaintiff with the understanding that they were being purchased by the corporations, as alleged in the answer. The court having failed to instruct the jury properly on the question of the burden of proof, the cause must be reversed, and, this being so, we do not deem it necessary to discuss the questions upon the evidence raised in the course of the trial. The cause is reversed and remanded, with directions to the court below to set aside the order appealed from, and grant a new trial."

The general rule in regard to errors in placing the burden of proof is stated as follows in 5 CJS"Appeal and Error" Sec. 1763:

"It is regarded as reversable error when the instruction places the burden on the wrong party, or places on a proper party a greater burden than proving his case by a preponderance of the evidence."

II

THAT THE COURT ERRED IN REFUSING TO GIVE PLAINTIFF'S PROPOSED INSTRUCTION NUMBER 7

Defendants Kendrick and Schober in paragraph 7 of their answer to the amended complaint pled the affirmative defense of good faith, and added for good measure the allegation that their conclusions were honest. As a result of these allegations an issue was raised by the pleadings. This issue was granted further cognizance in the court's instruction number 2 as follows:

> "Further answering the allegations of plaintiff and as a further and separate defense these defendants allege that the arrest of plaintiff by the defendants Kendrick and Schober and the charging of the plaintiff with a misdemeanor in the City Court of Ogden City by the defendant Kendrick was all done pursuant to the authority of said individuals as peace officers of the State of Utah; that the same was done in good faith (italics ours)."

It will be observed that the allegation of good faith was therefore doubly forced upon the consciousness of the jurors and the court at no time ever intimated nor instructed that such did not constitute a valid defense for any of the

defendants. It must be borne in mind that the reason for plaintiff's arrest which was admitted by the defendants was a violation of the City ordinances of Ogden City, to-wit: drunkenness, and that such was in fact a misdemeanor.

An investigation of the law relative to the defenses available to individuals charged with false arrest and false imprisonment indicates that probable cause and good faith is a defense where the wronged party was charged with the commission of a felony but is not a defense where the individual is charged with a misdemeanor. The Supreme Court of the State of Utah in Oleson vs. Pincock, 251P.23 had before it this precise question which, interestingly enough, also arose in Weber County, Utah. In the Oleson case plaintiff brought an action for false imprisonment and alleged that the defendants forceably and unlawfully deprived him of his liberty. Among other things, the defendant attempted to allege the defense of good faith. Justice Frick disposed of this argument very succulently at page 26:

"Where an officer has good cause for making the arrest in a felony case it is a defense, but merely to show good cause for making an arrest in a misdemeanor is not a defense."

The most recent pronouncement on this subject that we have been able to discover is the case of Ware vs. Dunn, California 183 P(2) 128. In that case the plaintiff registered in the Schuyler Hotel, Long Beach, California and advised the desk clerk that her husband was in the Navy and was expected in that evening. She attempted to register for both of them and thereafter her husband arrived at the hotel and in the course of time retired to their room. After the couple had gone to bed, two police officers and an agent of the hotel rapped on the door and forced their way into the room, on the pretext of making an investigation, and plaintiffs filed action charging assault and false imprisonment. From a judgment for the plaintiff the defendants appealed, alleging that they had acted in good faith, and the court ruled on the contention as follows:

"In the case with which we are here concerned the only justification for the officers to invade the sanctity and privacy of plaintiff's room, which was then their home, was the right to make an arrest. As heretofore pointed out, appellant officers were without such authority. Their entry under pretended color of official right was therefore an abuse of the authority invested in them as peace officers, and relegated them to the category of trespassers. "***the mere belief or suspicion that a misdemeanor is being, or has been, committed is insufficient to warrant an arrest without a warrant; nor may an arrest without a warrant be made on a belief, founded on information received from a third person, that a misdemeanor is being committed." (6 C.J.S., Arrest, Sect. 6, pp. 594, 595.) An Officer cannot justify an arrest on his "reasonable belief" that the person arrested was then committing a misdemeanor (Adair v. Williams, 24 Ariz. 422, 210 P. 853, 26 A.L.R. 278, 282). Nor is it sufficient that the officer believed that the person apprehended was engaged in the commission of a misdemeanor, though such belief may have been entertained in the utmost good faith (State v. Bradshaw, 53 Mont. 96, 161 P. 710; State v. Small, 184 Iowa 882, 884, 169 N.W. 116; McGuire v. State, 19 Ala. App. 138, 95, So. 565). The cases just cited are based on statutes similar to ours on the right of a peace officer to make an arrest without a warrant."

Lest there be any confusion as to the application of this decision to the facts at bar, Sect. 837 of the California Penal Code provides:

"A private person may arrest another: for a public offense committed or attempted in his presence."

Section 836:

"A peace officer may without a warrant arrest a person, (1) For a public offense committed or attempted in his presence."

The relevant Utah statutes provide:

77-13-4: "A private person may arrest another for a public offense committed or attempted in his presence."

77-13-3: "A peace officer may without a warrant arrest a person for a public offense committed or attempted in his presence."

It does not require any careful scrutiny to ascertain that the California statutes and the Utah statutes are identical.

The law in the Ware case is still the law in California as illustrated by the case of Hanna vs. Raphael Weill and Co., 203 P(2) 564 where the court stated:

"It is a settled rule that a police officer may not make an arrest for a misdemeanor that has not been committed in his presence."

This conforms to the case of Daniels vs. Milstead, Alabama (1930) 128 So. 447, where

plaintiff sued the defendant, a deputy game warden, and his bondsman for false imprisonment and malicious prosecution. The plaintiff was arrested without warrant and incarcerated in the county jail for allegedly hunting without a license. The court discussed the problem of probable cause and good faith and held:

> "In false imprisonment, the essence of the tort is that plaintiff is forceably deprived of his liberty; and the good intent of the defendant or the fact that he had probable cause that the offense was committed and that he acted in good faith will not justify or excuse the trespass. Crumpton vs. Newman, 12 Ala. 199, Rich vs. McInery, 103 Ala. 345, 15 So. 663, Gallon vs. House of Good Shepherd, 158 Mich. 361, 121 N.W. 631."

Relying on the law heretofore set forth the plaintiff submitted his proposed instruction number 7 as follows:

> "Neither an officer nor a private person can justify an arrest on his reasonable belief, that the person arrested was then committing a misdemeanor. The offense must have been committed. If the plaintiff was not guilty of the offense for which he was charged, then you must find for the plaintiff. "Reasonable belief" or "good faith" on the part of the defendants is not a defense. Cal. 183; P(2) 133 1947."

Which was refused by the court. No comparable instruction was at any time given by the court nor was the jury even by inference instructed that probable cause and good faith was not a defense.

III

THAT THE COURT ERRED IN REFUSING TO GIVE PLAINTIFF'S PROPOSED INSTRUCTION NUMBER 8 AND IN AWARDING DEFENDANT SCHOBER ATTORNEY'S FEES

Plaintiff's proposed instruction requested the court to instruct the jury that neither Mr. Kendrick nor Mr. Schober were special officers. The court in the first line of its instruction number 5 stated:

> "You are instructed that the defendant was not on the 27th day of November 1952 a special deputy of Weber County, Utah and was not by law authorized to perform the duties of a special deputy sheriff in said County ....."

The court, on the other hand, by inference in its instructions number 8 and number 9 in effect ruled as a matter of law that the defendant Schober was a special officer.

This view is confirmed by the court's subsequent granting of an allowance of $250.00

attorney's fees to the defendant Schober based upon the provisions of 78-11-10 U.C.A. 1953 which provides for an attorney fee to be awarded in any action filed against a sheriff, constable, peace officer, state road officer or any other person charged with enforcement of the criminal laws of this State in the event that the judgment in the cause is against the plaintiff and for the defendant.

This would seem to be conclusive of the finding by the Court that Mr. Schober was in fact a special or public officer of the State of Utah, and more particularly of Ogden City. We submit that this is an incorrect conclusion for the following reasons:

(1) Title 10-6-61 U.S.C. 1953 provides: "The Board of Commissioners of each city of the first or second class shall create, support, maintain and control a police department and a fire department in their respective cities."

Nowhere is the word "special policeman" provided, although by the provisions of 67-12-4 the appointment of special police officers by the governor

is authorized. The question therefore arises as to whether or not the power of creating a police department carries with it the power to create special policemen of the type and nature presently before the court, or of any type. Utah has not ruled upon this precise question, however it is submitted that the Utah case of Nasfell vs. Ogden City, 249 P(2) 507 lays down the test that must be applied and is in fact controlling.

The court will recall that in that case the court had before it the problem as to whether or not the power of Ogden City given by statute to regulate streets and the parking of vehicles for a fee included within it the implied power to establish a rule of evidence bearing upon the court. The court ruled in the negative and stated as follows:

> "It has been repeatedly stated by this court a municipal corporation possesses and can exercise the following powers and no others: First, it is granted in express words; second, it is necessarily or fairly implied in or incident to the powers expressly granted; third, it is essential to the

> accomplishment of the declared objectives and purposes of the corporation - not simply convenient but essential."

Certainly it cannot be held that there was any express grant. It is difficult to conceive that one can make a necessary implication that authority to create a police department necessarily includes the power to appoint special officers. It would be absurd to contend that the appointment of special officers was either a convenience or indispensible to Ogden City. It was, we will concede, a convenience to the railroads but to no others.

In the case of Utah Rapid Transit Company v. Ogden City, 58 P(2) 3 it was held that the statutory authority of a city to construct, maintain and operate street railroads carried with it no implied power to operate motor busses. We submit that it is self-evident that the duty to maintain a police department for the protection of the general population in no way be deemed to carry with it the implied power to appoint a special officer for the Union Pacific Railroad.

(2) The Utah Supreme Court in Sheriff of

Salt Lake County vs. Commissioner of Salt Lake County, 268 P 783, held that before a regular deputy sheriff could assume the duties of his office, three things had to occur: (a) the sheriff had to appoint him; (b) the appointment had to be confirmed by the Board of Commissioners; (c) the deputy sheriff had to file and sign his oath of office. The Chief of Police of Ogden City, M. J. Schoof, testified that it was necessary for Mr. Schober to file an oath of office (Tr 18). Counsel for the defendant then introduced defendant's "Exhibit 2" which provides:

> "I do solemnly swear I will support, obey and defend the Constitution of the United States, the Constitution of this State, and the ordinances of this City, and that I will discharge the duties of my office with fidelity, said office being Special Officer for O.U.R.&D. Ry. Co. /s/ R. F. Schober."

The defendant, by the introduction of his own exhibit, testified more vividly than anything plaintiff can say that at no time was he ever a special officer of the Ogden City Police Department or of any Department of Ogden City, and that the only office, if so it can be called, that he

held was that of a special officer for his employer.

(3) Even if it can be maintained that the statutes of Utah authorize the appointment of special police officers of Ogden City and that defendant Schober had done all the things necessary to qualify him to so act, nevertheless, an examination indicates that before Mr. Schober can be held to have been acting in the capacity of a special officer of Ogden City, it must be found that the essential elements of master and servant in fact existed between Ogden City and the defendant herein. One of these essential elements is the element of control. As is stated in 56 C.J.S., Master and Servant, Section 2(d), the relationship of master and servant exists when and only when the employer retains the right to direct the manner in which the business shall be done as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done; and the existence of such right of control has been said to be the really essential element of the relationship.

This rule was adopted in Utah in Gleason vs. Salt Lake City, 74 P(2) 1225. In the Gleason case the plaintiff tripped over a fire hose and was injured. She sued Salt Lake City, a municipal corporation, and the Auerbach Company, a corporation. The facts showed that the superintendent of Auerbach Company telephoned the fire department and requested that the water be pumped from an elevator shaft. The Chief of the Salt Lake City Fire Department sent regular firemen who were on duty for the City and who were being paid their regular salaries by the City to do this work. They took orders from the master mechanic, and the master mechanic from the Fire Chief. The court found that the negligence, if any, of the firemen could not be imputed to the Auerbach Company, because the relationship of master and servant did not exist, and at Page 1228 said:

> "The right of control and the exercise of such right was a determining factor in fixing the liability of the employer, notwithstanding the employee was paid wages by another."

The court quoted with approval from Phelps vs. Boone, 67 Fed 2nd 574 at Page 575 where it was stated:

> "The usual test in such circumstances, that is to say the determination of liability on the part of a servant is the right or power on the part of the person charged to command and control the servant in the performance of the casual act at the amount of performance. Under the conditions the employer or master is the person who at the moment has power of control."

In the instant case, R. E. Edens, the superintendent of the O.U.R.&D. Railway Company - the company that employed and paid Mr. Schober, made the following application for appointment of special police:

> "APPLICATION FOR APPOINTMENT OF SPECIAL POLICE
>
> "Application is hereby made for the appointment of the following OUR&D Co. employees, per list attached, as special officers without pay from Ogden City, to serve for the limited time of 365 days, in Ogden City with duties confined to the railroad.
>
> "This application is made upon the distinct understanding and condition that the said employees are not employees of Ogden City and are not subject to or under the control or supervision of the Chief of Police or any other representative or official or directing authority of Ogden City, but on the

contrary, are my employees and are under my supervision, direction and control and are paid by me, and shall act wholly and solely in accordance with the duties required by me as his employer.

"And I hereby agree to protect and save harmless the said Chief of Police and Ogden City, of and from any and all loss, cost, liability, damage or expense of said appointment, and particularly with respect to the requirement's of the Workmen's Compensation Law of the State of Utah and otherwise.

"Dated at Ogden, Utah, this 15th day of January, 1952.

"Signed /s/ R. E. Edens

Supt., The Ogden Union Railway & Depot Company
Address: Ogden, Utah"

Note who exercises supervision and directs Mr. Schober. Note where Mr. Edens first control lies.

The transcript of Mr. Edens' testimony only confirms what he has written in his application. The testimony of the Chief of Police is as follows:

"Q At any time since the date that application for appointment in January of 1952 has R. F. Schober acted under your direction or supervision, or as an officer of the Ogden City police force?

"A No, sir."

If in the Phelps case the firemen of Salt Lake City could not be determined to be the agents of the Auerbach Company because the latter had no control over their activities, it is submitted that the acts of Mr. Schober cannot be held to be performed as an agent or special officer of Ogden City when the latter enjoyed the same lack of control, and that therefore it must be concluded that on the basis of the testimony, not only of the Chief of Police of Ogden City, but of Mr. Schober's own immediate employer, any acts performed by him were performed in the course of his employment and under the direction of Mr. Edens.

Thus we find in Foster vs. Grand Rapids Ry. Co., Mich. 104 N.W. 381, plaintiff sued the defendant railroad alleging that he was ejected and injured by an employee of the defendant. The defense was raised that the individual who caused the plaintiff to be ejected and injured was in fact a special deputy sheriff. The court discussed this problem, saying:

"Many instances are therefore found in law books where the public authorities

have appointed police officers to preserve order in these places, but at the expense of those responsible for them. So the public authorities, in this case, appointed deputy sheriffs with the same powers and duties as they would exercise in any other place. When acting purely in their capacity as police officers, the defendant is not responsible for their acts. Only when the defendant, through its authorized agents has employed or directed such police officers to act for it, does it become responsible."

It follows, therefore, that the admitted facts show a lack of any control on the part of Ogden City and that the duties of Schober of necessity were those of an individual and an employee. It further follows that he was not a special officer nor was he acting as such, but as a result thereof, he was not entitled to attorneys fees which could only have been granted to him had he been in fact a public officer acting in such capacity.

IV

THAT THE COURT ERRED IN GIVING ITS INSTRUCTION NUMBER 5

The portion of Instruction number 5 which the plaintiff alleges to be in error reads as follows:

"You are instructed that the defendant Kendrick was not on the 27th day of November 1952 a special deputy of Weber County, Utah, and was not by law authorized to perform the duties of a special deputy sheriff in said county, but you are further instructed that on the 22nd day of November the aforesaid Kendrick was a special agent of the Union Pacific Railroad Company and he was, by virtue of the laws of the State of Utah and ordinances of Ogden City hereinafter referred to, authorized to make lawful arrests in the Union Depot at Ogden, Utah."

It is submitted that while the instruction as such is technically correct, it is so grossly misleading as to result in confusion in that it implies that Kendrick enjoyed some status not enjoyed by the ordinary mortal. It is true that as special agent he was authorized to make a lawful arrest. It is likewise true that any person at or in the Union Depot at Ogden on the 27th day of November, whether they be a special agent, ordinary employee, passenger, or a guest of the Union Pacific Railroad, had the power to make a lawful arrest.

It was found in the Hanna case, supra:

"Insofar as the employer respondent is concerned all this discussion as to the status of White seems to be idle since the arrest was originally made by Methoe who was not a special officer but merely an

employee hired to protect her employers' property."

That was precisely the status of Mr. Kendrick on the 27th day of November 1952. He was merely an employee hired to protect his employers' property. Any statement by the court that in any way embellishes or adds to, or gives him color or office could not be other than prejudicial to the rights of the plaintiff.

V

THAT THE COURT ERRED IN GIVING ITS INSTRUCTION NUMBER 8

The court's 8th instruction reads as follows:

> "You are instructed that the statutes of this State in effect on November 27, 1952, provided as follows:
>
> > "32-7-13. Drinking and drunkenness in public places... No person shall drink liquor in a public building, park or stadium or be in an intoxicated condition in a public place."
> >
> > "32-8-10. Drunkenness in public place.--Everyone who violates any of the provisions of section 32-7-13 shall be liable for a first offense to a penalty of not less than $10 nor more than $50 and in default of immediate payment, to imprisonment

for not more than thirty days; for a second offense to a penalty of not less than $25 nor more than $100 and in default of immediate payment to imprisonment for not less than one month nor more than two months. For a third or subsequent offense, to imprisonment for not less than one month nor more than six months without the option of a fine."

You are also instructed that the statutes of this State provided as follows:

"32-8-25. Duties of officers respecting infringement of this act.--All inspectors appointed under this act, and all sheriffs, deputy sheriffs, mayors, city judges, justices of the peace, constables, marshals and peace officers, and all district, county, city and town attorneys, and clerks of courts shall diligently enforce the provisions of this act.***"

Under these statutes it was not only the right of the defendants Schober and Kendrick but their positive duty under the law of this State to arrest the plaintiff if, in fact, he was in an intoxicated condition at the depot in Ogden on November 27, 1952."

The court will recall that by the pleadings it has been admitted that the plaintiff was arrested for an alleged violation of the ordinances of Ogden City. It likewise was admitted that a criminal action was filed against the plaintiff charging him with a violation of the ordinances of

Ogden City. It is submitted, therefore, that it must be self-evident that the statutes of the State of Utah were in no way involved in the action, and must be considered entirely irrelevant except as it permits a jury to find that the plaintiff might not, nevertheless, have committed a violation other than the violation charged by reason of the State statutes. Further, the last paragraph of the instruction is completely at variance with instruction number 5 in that it now states that because Kendrick is a special officer he had a duty to arrest the plaintiff, when in fact, the court had just finished instructing the jury to the effect that Mr. Kendrick was not a deputy sheriff.

If there need be any further evidence to the effect that the 5th instruction set forth immediately above was misleading and prejudicial, it must be resolved in favor of the plaintiff by the immediate subsequent act of the court in calling Mr. Kendrick a special officer. This begs the issue as to the status of Mr. Schober. Plaintiff submits that on the basis of the law and evidence

heretofore set forth, the instruction is equally inapplicable to him. How, it might be asked, could the defendants Schober and Kendrick, have a positive duty as officers, to enforce the law if they, in fact, were not officers? How can anything be inferred other than the fact that the court has not only declined to find that Schober was not an officer, but has taken out the question of fact as to whether he was or was not from the jury, by his statement that Mr. Schober, as a special officer, had a positive duty? How can any conclusion be reached other than the fact that this instruction flies in the face of, and repudiates the facts and instructions theretofore given?

VI

THAT THE COURT ERRED IN GIVING ITS INSTRUCTION NUMBER 9

The same statements made in the preceeding objection to instruction number 8 can be repeated in instruction number 9. Again, in said instruction, the court referred to Mr. Kendrick and Mr. Schober as officers, not as employees. Again the court, as it has throughout its instructions, gave

a status to these employees to which they were not entitled, and implies a protective cloak which is without meaning in law, in view of the fact that by statute, the right to arrest by an individual for a misdemeanor is the same as the right of an officer to arrest for a misdemeanor. Again the court misled, confused and prejudiced the rights of the plaintiff.

VII

THAT THE COURT ERRED IN GIVING ITS INSTRUCTION NUMBER 17 AND IN REFUSING TO GRANT PLAINTIFF'S PROPOSED INSTRUCTION NUMBER 21

Plaintiff makes exception to the court's instruction number 17 because the court failed to instruct that the jury could consider the financial status of the defendant in considering the problem of punitive or exemplary damages. The plaintiff's proposed instruction number 21 fully covered this problem and stated in part:

> "As an element in considering the amount of punitive damages, you may consider the wealth of the defendants because a verdict that may punish a person of limited means may not be of exemplary effect upon a defendant of very substantial means and wealth."

In the case of Wilson vs. Oldroyd, 267 P(2) 759, Judge Crockett stated:

> "It is well settled that it is proper to receive evidence and to consider the wealth of the defendant as bearing upon the issue of punitive damages. It is obvious that the same amount of money might be a greater punishment to a poor man than it would be to a rich one."

In addition to the Florida case of Kilgore vs. Kilgore, 79 S(2) 305, we might also refer the court to the case of Boice vs. Bradley Mining Co., Idaho 1950 92 Fed Supp 750 and the case of Parrott vs. Bank of America, Calif. 217 P(2) 89. In the Boice case the court stated:

> "Plaintiff, a doctor, sued John Bradley, an individual, and the Bradley Mining Co., a corporation, for malicious prosecution and false imprisonment. One of the questions raised on appeal was whether it was proper to consider the wealth of the defendant in considering damages. The court found it was proper, saying:
>
> "Beyond the broad general rule just mentioned, there are special considerations singularly applicable to the case at bar. According to the great weight of authority, the defendant's pecuniary ability may be considered in fixing the amount of punitive or exemplary damages. There was ample evidence in the case from which the

jury could have inferred and must almost certainly have inferred that the defendant, Bradley Mining Company was a wealthy company. There is also authority that the status of the plaintiff may be considered in fixing the amount of the award."

VIII

THAT THE COURT ERRED IN GIVING ITS INSTRUCTION NUMBER 10

Instruction number 10 reads as follows:

"You are instructed that a person is drunk or intoxicated within the meaning of the Ogden City ordinance I have quoted to you when he is under the influence of intoxicating liquor to such an extent that he is not entirely himself. It is not necessary that a person be "dead drunk" or "hopelessly drunk" in order that he be considered drunk or intoxicated within the meaning of the ordinance. If a person has consumed enough intoxicating liquor that his mental or physical capacities or his judgment or his normal control of his actions have been materially impaired, then such person is drunk or intoxicated within the meaning of those words as they are used in that ordinance."

It is submitted that the instruction is not correct in that one may be not entirely himself and not have his mental or physical capability materially impaired. However, in view of the other and infinitely more serious errors of

which plaintiff complains, he is not disposed at this time to labor the court about this point except to observe that such error is cumulative and overpowering when considered with all the other errors present.

IX

THAT THE COURT ERRED IN GIVING ITS INSTRUCTION NUMBER 15

In excepting to the court's instruction number 15, the plaintiff is not unaware of the decision of the Supreme Court of Utah in UHR vs. Eaton, 80 P(2) 925 and as a result plaintiff will not concede that the facts produced at the trial do not warrant the instruction for the reason that the transcript of the evidence is not available before this court.

There is, however, a second basis for objection that can be made at this time.

In 54 Corpus Juris Secundum entitled "Malicious Prosecution", Section 81b the text states:

> "In suits for malicious prosecution, the defendant may in a proper case, plead specially facts and circumstances which

> refute malice and show affirmatively assistance of probable cause, or show that the defendant acted on the advice of counsel.....However, if defendant thus resorts to a special plea or answer it is not sufficient for him to state the matters of defense in general terms, as, for instance, that he had probable cause, or acted on advice of counsel, but the facts constituting the defense must be alleged."

It will be seen as a matter of law the defense may be classified as an "affirmative defense." This is also the position of the Supreme Court of Utah which seemed to be held in the UHR case where it is called an affirmative defense.

Under the provisions of Rule 8c of Utah Rules of Civil Procedure, it is mandatory that a party set forth affirmatively all matters which constitute an affirmative defense.

An examination of the pleadings indicates that the defendants nor any of them set forth any facts upon which this defense could be predicated.

CONCLUSIO 3

It is a fundamental rule of law that where a court acts upon a fundamentally erroneous theory

which is apt to affect adversely the substantial rights of the appellant, the court has committed prejudicial error, 5 C.J.S. "Appeal and Error," Section 1779. The only way that the instructions given by the court assume a pertinence to the issues raised in the trial which at the same time would justify the court's refusal to grant plaintiff's proposed instructions as hereinbefore set forth is if one will assume that the court was applying the law as applicable to felonies as distinguished from the law applicable to misdemeanors. Eliminating special cases and discussing only general principals, we find that in misdemeanor the law relative to police officers as stated in C.J.S. Section 6(2) is:

> "An officer does not have the power to arrest without a warrant for a misdemeanor not committed in his presence and view and an arrest without a warrant for a misdemeanor not committed in an officer's presence may constitute an assault."

And again at Section 6(4):

> "An officer can not arrest without a warrant a person whom he merely believes committed a misdemeanor."

Examining Section 8 of the same title and volume we find that the law is substantially identical as it affects a private person. There we see:

> "To justify an arrest by a private person without a warrant for an offense less than a felony, where permitted by statute, it is essential that such offense shall actually have been committed or attempted."

In view of the fact that we are considering an arrest for drunkenness, a misdemeanor, the court's ruling does not square with the above enunciated principals because, under the above law, both private individuals and officers operate under the same disability and in the instant case, the only place where the question as to whether Schober and Kendrick were officers becomes important is as it affects the liability of either the Union Pacific Railroad or the Ogden Union Railway and Depot Company, or both, because if the aforementioned gentlemen were special officers acting within the scope of their duties as special officers and not under the control of their employers, then there could be no liability

on the part of their respective employers.

A different problem arises when one considers a felony. In 6 C.J.S. "Arrests", Section 6 we find:

> "A peace officer may arrest without a warrant one whom he has reasonable or probable grounds to suspect of having committed a felony even though the crime was not committed in his presence and even though the person suspected is, in fact, innocent."

The same volume, Section 8, as it relates to an individual, provides:

> "In order to justify an arrest (by a private person), it is necessary and sufficient to show that a felony was actually committed and that there was reasonable grounds for suspecting that the person arrested committed it. Generally mere proof of reasonable and probable cause for making an arrest without a warrant will not justify a private person unless a felony has actually been committed."

As more tersely stated in American Jurisprudence "Arrest", 22 A.J. Section 79

> "There is a well established difference between what will justify an arrest by a private person and what will justify an arrest by an officer. Defense of the individual must rest upon proof both of a reasonable ground and of the actual commission of a felony, if no felony was committed an arrest by a

private person is illegal and may give rise to an action, although the same acts would be O.K. if done by an officer."

Applying these rules to the Court's instructions it is obvious that the Court erroneously applied the law applicable to felonies. If this had been a case involving a felony then reasonable or probable cause and official status would have become of vital importance and the instructions requested by plaintiff should have been denied.

Conversely the instructions given by the Court were correct if a felony were the subject of the action, because the question as to whether or not these men were in fact officers and/or entitled to the privileges and immunities of an officer would be of vital importance.

Ignoring the fact that the court was willing to imply official status to a private employee because he was designated as a special agent, if one is willing to apply this incorrect theory and basis for instructions, a logical coherent pattern results. Unfortunately the major premise upon which

that theory is based was erroneous in that they did not have a felony as the subject of the action. It must therefore be concluded that the court, in fact, had adopted an erroneous theory and that it so instructed the jury on an erroneous theory, and that as a result the jury was deprived of the opportunity of being properly instructed upon the law applicable to the issues raised, which could only have resulted in error prejudicial to the plaintiff.

The court's instructions five eight and nine, as a result, were not applicable to the issues raised. As the court has stated in 5 C.J.S. "Appeal and Error", Section 1764:

> "Where an instruction, not applicable to the issue, is clearly calculated to mislead - and the complaining party was prejudiced, the giving of such instructions is reversable error."

See also Hillyard vs. Blair, 47 Ut 561, 155 P 449; Caperon vs. Tuttle, 100 Ut 476, 116 P(2) 402.

In assuming and instructing the jury to the effect that the defendant was a special officer, the court again committed reversable error. The

rule as set forth in 5 C.J.S., "Appeal and Error", Section 1776 is:

> "Ordinarily the assumption of a material fact where the error with regards to it is conflicting or where it is unsupported by any evidence will constitute ground for reversal."

The most that can conceivably be held as far as Schober is concerned is (1) that there was a subsequent conflict in testimony as to whether or not Schober was in fact a special police officer of Ogden City, and (2) as to whether or not he ever acted as a special police officer of Ogden City. It is submitted that the court's instructions stating that he was a special officer was a clear assumption of fact that invaded the province of the jury at best, and, in fact, deprived the plaintiff of an explicit instruction to the effect that for the purposes of the action, Mr. Schober was not a special officer.

Finally, with regard to plaintiff's requested instructions number seven and eight, we find in 5 C.J.S. "Appeal and Error" Sec. 1774

the following statement:

> "When a timely request is made for instructions which correctly propound the law and which are warranted by the pleading..., it is the duty of the court to give them unless covered by other instructions given by the general charge and a non-compliance with this duty will necessitate a reversal when it cannot be said that the appellant was not prejudicial, as where the court refused correct instructions setting forth the theory of a parties case, or where the evidence is conflicting and the verdict general and it was not possible to say how the jury would have resolved the question if the requested instruction had been given. The refusal to give a proper instruction is not rendered harmless....by the fact that the issue upon which the charge was asked below is not urged on appeal.
>
> "Applying these rules judgment has been reversed for prejudicial error in failing or refusing to give instructions in an action...or false imprisonment..."

That the above statement is likewise law in Utah see Armstrong vs. Larsen, 186 P 97 where the court states:

> "It was the duty of the court to construe the contract and to advise the jury of the respective rights of the parties thereof. The request embodied a correct interpretation of the contract. It was the duty of the court to give that or a similar instruction. The failure to do so, in our judgment, constituted prejudicial error."

It is therefore respectfully submitted that

the court so incorrectly advised the jury as to the law applicable to the pleadings involved in the case at bar as to hopelessly and irreconcilably mislead and confuse the jury as to render it impossible for the plaintiff to have had a fair and impartial trial, and that as a result thereof this case should be reversed and a new trial ordered.

Respectfully submitted,

DAVID S. KUNZ,

Attorney for Plaintiff
and Appellant